82-1533

No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

LANDON L. WILLIAMS, WILLIAM BOYLE AND GEORGE BARONE,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

RICHARD BEN-VENISTE, ESQUIRE
BEN-VENISTE & SHERNOFF
4801 Massachusetts Avenue, N.W.
Suite 400
Washington, D.C. 20016
(202) 966-6000

IRVING ANOLIK, ESQUIRE
20 Vesey Street
New York, New York 10007
(212) 732-3050

Counsel for Petitioners

Washington, D.C. • THIEL PRESS • (202) 638-4521

QUESTION PRESENTED FOR REVIEW

Whether a trial court is free to disregard Fed. R. Crim. P. 24(c) and substitute an unsequestered alternate juror, previously discharged by the court, for an incapacitated member of the jury after seven days of jury deliberations and over defendants' objection.

PARTIES

The parties to the proceeding before the Court of Appeals for the Eleventh Circuit whose judgment petitioners Landon L. Williams, William Boyle and George Barone seek to reverse were defendants-appellants Dorothy O. Kopituk, Raymond C. Kopituk, Oscar Morales, Fred R. Field, Jr., Cleveland Turner, James Vanderwyde, Landon L. Williams, William Boyle and George Barone and plaintiff-appellee the United States of America.

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OPINIONS BELOW

The opinion of the Court of Appeals for the Eleventh Circuit, reported as *United States v. Kopituk,* 690 F.2d 1289 (11th Cir. 1982), appears in Appendix A ("App. A") hereto. The order of the Court of Appeals denying petitioners' petition for rehearing, not officially reported, appears as Appendix B ("App. B") hereto. The opinion of the United States District Court for the Southern District of Florida (Hoeveler, J.), reported as *United*

States v. Barone, 83 F.R.D. 565 (S.D. Fla. 1979), appears in Appendix C ("App. C") hereto.

JURISDICTION

The judgment of the Court of Appeals was dated and entered November 4, 1982. (App. A at 2a; 690 F.2d at 1289.) A timely petition for rehearing was denied on January 14, 1983. (App. B.) The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and Rules 17.1(a) and (c) of the Rules of this Court.

CONSTITUTIONAL AND REGULATORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and

to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

Rule 23(b) of the Federal Rules of Criminal Procedure provides:

> Juries shall be of 12 but at any time before verdict the parties may stipulate in writing with the approval of the court that the jury shall consist of any number less than 12 or that a valid verdict may be returned by a jury of less than 12 or that a valid verdict may be returned by a jury of less than 12 should the court find it necessary to excuse one or more jurors for any just cause after trial commences.

Rule 24(c) of the Federal Rules of Criminal Procedure provides, in relevant part:

> The court may direct that not more than 6 jurors in addition to the regular jury be called and impanelled to sit as alternate jurors. Alternate jurors in the order in which they are called shall replace jurors who, prior to the time the jury retires to consider its verdict, become or are found to be unable or disqualified to perform their duties. Alternate jurors shall be drawn in the same manner, shall have the same qualifications, shall be subject to the same examination and challenges, shall take the same oath and shall have the same functions, powers, facilities and privileges as the regular jurors. An alternate juror who does not replace a regular juror shall be discharged after the jury retires to consider its verdict.

STATEMENT OF FACTS

On June 7, 1978 petitioners George Barone, William Boyle and Landon L. Williams, union officers, along with nineteen other defendants,[1] were named in a 70-count indictment returned by a federal grand jury sitting in the Southern District of Florida. (App. A at 3a; 690 F.2d at 1294-95.) Of the eleven defendants who went to trial, nine were convicted. (App. A at 3a n.2; 690 F.2d at 1294-95 n.2.) The alleged offenses—basically involving the solicitation and receipt of funds from a number of individuals and businesses who employed union members and the failure to include this income on federal income tax returns—spanned a period of more than ten years. (App. A at 2a; 690 F.2d at 1294.)

Trial commenced on January 29, 1979. (App. C at 120a; 83 F.R.D. at 566.) The jury was instructed as to the law on Friday, August 11, 1979, and immediately retired to deliberate. The court then intentionally contravened the requirements of Fed. R. Crim. P. 24(c) by refusing to discharge the alternates. (App. D at 139a-141a.) Instead, and over defendants' objections (App. D at 142a[2]), the court ordered the two alternates sequestered separate and apart from the deliberating jurors.[3] (App. D at 142a-145a.) On August 15, 1979 the court

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[1] Included as defendants were several employers who were charged with making illegal payoffs. Motions by union officers and employers for severance were denied. (App. A at 50a; 690 F.2d at 1315.)

[2] References to "App. D ___" are to the Trial Transcript in the proceedings below.

[3] Importantly, while the court directed the two alternates not to discuss the case with "anybody, not the Press, not . . . the lawyers, not . . . anyone else . . .," the court did not instruct them not to discuss the case *inter se*. (App. D at 141a.)

brought the two alternates into the courtroom, thanked them for their service and advised them that while there had almost been occasion for their use, the "problems"[4] had passed. (App. D at 165a-167a.) Further, the court stated that although the court was discharging them,[5] they should "avoid the Press and television coverage in the slim possibility that we might still call you." (App. D at 166a.)

On Monday, August 20, 1979, the court received a note from the jury advising that one of the jurors, Mrs. Loescher, appeared to be in need of "professional help."[6] (App. D at 171a.) The court inquired as to whether the parties would stipulate to an eleven member jury. (App. D at 228a-229a.) All defendants declined. (*Id.*) The jury was instructed to suspend its deliberations. (App. D at 238a.)

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[4] One of the jurors had related to the others information obtained from an improper source, and, contrary to the court's admonitions, did not report the incident to the court. (App. D at 151a.) The circumstances surrounding this incident provide insight into later developments. See note 9 *infra*.

[5] This was consistent with the court's earlier expressed intention to keep the alternates sequestered for some limited period after deliberations had begun. (App. D at 139a-140a, 143a-144a.)

[6] As then described by the deputy marshal responsible for guarding the jury room:

> [Mrs. Loescher] seems to think that someone is telling her things to do and most of them have nothing to do with the case whatsoever. . . .
>
> She thinks the Lord is talking to her. She also thinks Lucifer is after her. That at one time she made the statement that she was Jesus. Another time she made the statement she was Moses. . . .

(App. D at 173a.) This marshal had previously advised the court on the preceding Friday, August 17, that "Mrs. Loescher was acting strangely." (App. D at 169a.)

By this point in its deliberations, the originally constituted jury had initiated approximately 17 oral and written communications with the court, including (a) seven requests (some with subparts) for substantive information or instructions concerning the law and/or evidence;[7] (b) nine requests (some with subparts) for procedural guidance concerning the conduct of the jury's deliberations;[8] and (c) a note concerning one juror's disclosure of information obtained from an improper source.[9]

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[7] For example, the jury requested additional instructions with respect to extortion, racketeering, and hearsay (T 101:26-30) and repetition of trial testimony concerning certain witnesses (T 101:88-90) and the dates of certain events (T 101:89-90; T 103:2). (References to excerpts from the trial transcript which do not appear in App. D hereto will be cited as "(T ___:___)", the first number representing the volume of the transcript and the second number(s) representing the particular page(s) cited.) (See also T 100:48, T 101:27-29.)

[8] Included among these communications were requests for an adding machine and a 12-column accounting pad, obviously requested by the jury for review and analysis of the extensive financial evidence presented during the course of the trial. (T 102:4.) (See also T 100:2, T 100:3, T 101:3, T 101:31, T 101:69, T 103:2.)

[9] A more detailed examination of the available facts concerning this incident, which obviously had a polarizing effect on the jury, is enlightening. On the fourth day of deliberations, one of the jurors, Mrs. Arrington, advised the other jurors that one of the defendants, Reverend Elizah Jackson, "was acquitted due to not enough evidence." (App. D at 150a.) In fact, defendant Jackson's motion for a directed verdict of acquittal had been granted by the court. (App. A at 3a n.2; 690 F.2d at 1294 n.2.) Contrary to the court's instruction that the presence or absence of any of the defendants was not a matter for their concern (App. D at 160a & T 99:64, T 99:86), Juror Arrington had not reported her receipt of this information from an outside source to the court. (App. D

[footnote continued]

In response to the jury's requests, the court reread almost all its instructions on the law and provided the jury with five or six copies of the typewritten instructions. (T 101:41-79, T 102:26-28.) The jury had also been furnished with the trial exhibits. (T 99:152-153.) The two alternates were, of course, excluded from all review and discussions surrounding the foregoing communications.

A court-appointed psychiatrist examined Mrs. Loescher on the evening of August 20, and reported to the court and counsel on the following morning that Mrs. Loescher, a psychiatric nurse with no prior history of emotional disorders, appeared to be "going through a

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at 150a-151a.) When questioned by the court in the presence of the other jurors and counsel, Juror Arrington stated, "Well, it just slipped out, Your Honor. . . . I didn't intend to say it." (App. D at 160a.) Despite the court's initial observation that "[w]e ought to seriously consider whether or not she should remain as a juror" (App. D at 151a), the court denied motions to dismiss Juror Arrington and declare a mistrial. (App. D at 151a-154a.) When the jury first entered the courtroom to report the incident it was apparent that Mrs. Loescher was very upset. One of the attorneys noted that Mrs. Loescher was crying and was close to collapse. (App. D at 147a-148a.) The court observed that other members of the jury were also upset. (App. D at 151a.) It was clear that Mrs. Loescher was critical of Mrs. Arrington's failure to heed the instructions of the court. (App. D at 160a.) Nevertheless, the court responded to Mrs. Arrington's explanation by telling her and the other jurors:

> *I understand. I am not here to criticize anybody.* . . . I want to tell you all to relax and settle down and not be upset with each other, because that is not what we are here about. *Those problems happen,* and it is our function to try to solve them as best we can.

(App. D at 160a; emphasis added.) It may well have appeared to Mrs. Loescher that, notwithstanding the court's prior directives, the judge was excusing Mrs. Arrington's misconduct. It may have thus seemed to Mrs. Loescher that she could not turn to the court for help or guidance relating to an impasse in deliberations.

manic episode" and was "by every definition psychotic." (App. D at 244a.)[10] The psychiatrist further advised that Mrs. Loescher was not capable of functioning as a juror. (App. D at 246a.)[11] In his confidential report to the court, the psychiatrist revealed that Mrs. Loescher had been the lone dissenter on a vote taken by the jury. (App. D at 244a.) The court, without objection, discharged Juror Loescher. (App. D at 261a.)

After again inquiring as to whether the defendants would stipulate to a jury of eleven, and again receiving a unanimous declination (App. D at 261a-262a), the court announced that it was considering recalling and impaneling the first alternate juror, who by this time had been free from sequestration for seven days.[12] (App. D at 262a.) After extensive argument over the legality of reactivating the previously discharged alternate, the court

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[10] The psychiatrist found, *inter alia*, that Mrs. Loescher was "unquestionably grandiose," believing that she was of genius intellectual ability, and that she suffered from "religious delusions," including that "God had given her the wisdom of Solomon," that she "was like Christ at Gethsemane" and that she was "on the jury . . . as a way of making th[e] case come out the way God wants." (App. D at 243a-244a.)

[11] The psychiatrist noted that, in addition to her inability to function with good judgment,

> [Mrs. Loescher] would be extremely difficult for the other jurors to communicate with and I'm sure that she would serve as a disruptive force on the jury.

(App. D at 245a.)

[12] The court stated, however:

> I will be frank with you that the research suggests that it [i.e., recalling the alternate] is probably not the thing to do.

(App. D at 262a.)

overruled the defendants' strenuous objections. (T 106: 2-44.) Petitioners' timely motions for mistrial were denied. (T 106:52-54.)

The alternate juror, Mrs. Evangelist, was then summoned to court and interrogated by the trial judge in the presence of counsel. (App. D at 264a-267a.) The court accepted at face value the alternate's assurance that she had not come in contact with any print or electronic media coverage of this highly publicized case during the week following her discharge (App. D at 264a-265a),[13] as well as her claim that she did not discuss with anyone the trial which had just occupied the past six months of her time. (App. D at 264a-267a.)[14]

The court then individually interrogated the remaining eleven jurors on the extraordinary question of whether they felt they could totally disregard and put out of their minds all prior deliberations, and begin their deliberations anew together with Mrs. Evangelist. (App. D at 278a-327a.) In each instance, however, before inquiring as to the juror's ability to start afresh, the court told the juror that the questioning was being conducted with a view toward going forward with the case and that the case could only proceed if the jurors could start anew. (App. D at 278a, 284a, 287a-288a, 294a, 298a, 300a,

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[13] The court had previously suggested a need for sequestration of the alternates at the time the jury initially retired, stating: "There obviously is going to be publicity about the case now. . . ." (App. D at 143a.)

[14] However, the court did not inquire as to whether Ms. Evangelist had discussed the case with her fellow alternate, with whom she had been jointly sequestered for the first five days of the jury's deliberations. (App. D at 139a-144a.) To assume they did not discuss the case flies in the face of common sense.

302a, 305a, 307a, 310a-311a, 314a, 318a, 321a, & 324a.)

In the course of the court's questioning, six of the eleven jurors expressed initial reluctance and/or doubts as to their ability to commence new deliberations.[15] In

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[15] For example, in response to the Court's questioning, Juror Rollins stated:

> I want to hurry and get this over with. . . .
>
> * * *
>
> [*The Court*]: We are going to substitute an alternate juror. In order to do that, you must all begin at square one.
>
> *Juror Rollins:* All over again?
>
> *The Court:* All over again.
>
> * * *
>
> *Juror Rollins:* Do you mean all that voting and stuff—
>
> *The Court:* I mean this, Mrs. Rollins, so that you understand exactly what I am saying:
>
> Just like when I finished instructing you and you walked back there for the first time. You have got to start over again.
>
> *Juror Rollins:* Oh, no. Do you mean go over and through everything?
>
> * * *
>
> *Juror Rollins:* Well, if I have to, I will do it, but I sure—
>
> *The Court:* Do you think you can do it?
>
> *Juror Rollins:* You know, I have took the oath. If I have to, I will. I really—I don't want to do that.

(App. D at 294a-295a.) Juror Spires replied to the Court's questioning as follows:

> Do I have a choice, Judge? . . . I have no physical or mental reasons why I can't, but I just want to be with my family again.

(App. D at 324a.) Several other jurors expressed concerns as to the personal burdens which new deliberations would impose. *See, e.g.*, App. D at 280a (Juror Rappel stated new deliberations "would create a little hardship . . . [a]s far as my personal health

[footnote continued]

several instances, the judge interrupted or attempted to minimize such jurors' expressions of concerns. (*See, e.g.*, App. D at 280a, 289a, 295a, & 302a-303a.) Ultimately, under the court's suggestive questioning, all eleven remaining jurors confirmed that they would be able to erase from their minds all conclusions formed and opinions expressed since their deliberations began almost two weeks earlier. (App. D at 279a-280a, 284a, 295a, 300a, 302a-303a, 305a-306a, 311a-312a, 318a-319a, & 324a-325a.) Notably, in the course of this inquiry, the psychiatrist's information regarding Mrs. Loescher's participation in the balloting was corroborated, at least insofar as it was learned that the jurors had formed opinions, and had cast ballots on the question of the defendants' culpability. When asked about her ability to recommence her deliberations with the alternate, one of the original jurors responded, "Do you mean all that voting and stuff—" (App. D at 294a.)

At the conclusion of the court's questioning, the court indicated its intention to seat the alternate. (App. D at 334a.) Defendants then renewed their motions for mistrial and moved to dismiss the indictment on grounds of double jeopardy. These motions were denied. (App. D at 334a-336a; App. C.) Thereafter, the alternate was seated (App. D at 337a), the jury was reinstructed and sent to deliberate. (See App. D at 337a-341a.)

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and my wife."); App. D at 289a (Juror Kennedy commented: "I have been very nervous the last few days. I am willing to give it a try. I can do it."); App. D at 299a (Juror Russell stated: "[I]t's kind of hard to say because . . . I would like to see my family . . . . [m]y daughter has been sick."); App. D at 302a (Juror Pratt indicated he could only begin new deliberations "as long as my employer doesn't say anything."); App. D at 311a (Juror Fuentes stated: "I don't believe I can stay [away from work] such a long time . . . .").

Two days later, on September 1, 1979 the jury returned its verdicts. (App. A at 33a; 690 F.2d at 1308.)

REASONS FOR GRANTING THE WRIT

The plain language of Rules 23(b) and 24(c) foreclosed the trial court from replacing a regular juror with an alternate after deliberations began. The only procedure available for continuing to verdict at that point was that provided by Rule 23(b), which allows for a verdict by a jury of less than twelve provided that the parties so stipulate in writing and the court gives its approval.

> ***Jury of Less Than Twelve.*** Juries shall be of 12 but at any time before verdict the parties may stipulate in writing with the approval of the court that the jury shall consist of any number less than 12 or that a valid verdict may be returned by a jury of less than 12 should the court find it necessary to excuse one or more jurors for any just cause after trial commences.

Fed. R. Crim. P. 23(b).

In the absence of such a stipulation, the court had no alternative but to declare a mistrial. The unambiguous directive of Rule 24(b) required the trial court to discharge the alternates after the jury retired to deliberate.

> An alternate juror who does not replace a regular juror *shall be discharged* after the jury retires to consider its verdict.

Fed. R. Crim. P. 24(c) (emphasis added). Thus, under the Rules, once the jury retires the alternates' function is concluded. To substitute a discharged alternate after the deliberations have begun is to inject a stranger into the proceedings and to render the verdict invalid.

The Courts of Appeals are divided on the question whether the plain language of Rule 24(c), requiring the discharge of alternates upon commencement of deliberations, may be simply disregarded by the district courts. The Ninth Circuit's en banc decision in *United States v. Lamb,* 529 F.2d 1153 (9th Cir. 1975), squarely conflicts with the decision by the Eleventh Circuit panel below. Moreover, opinions of the Second, Fourth and Tenth Circuits are in apparent accord with *Lamb,* while only the Fifth Circuit and perhaps a Seventh Circuit case support the decision below. Accordingly, the Court should grant review to resolve the conflict in the Circuits, to reinstate the plain meaning of Fed. R. Crim. P. 24(c) and to prevent further erosion of the Federal Rules of Criminal Procedure through the ad hoc legislation of district courts.

I.

THIS COURT SHOULD GRANT CERTIORARI TO RESOLVE THE CLEAR CONFLICT BETWEEN THE ELEVENTH AND NINTH CIRCUITS.

There can be no doubt that had petitioners' trial been in the Ninth Circuit, the jury would have been discharged, a mistrial declared and a new trial ordered. In *United States v. Lamb,* 529 F.2d 1153 (9th Cir. 1975), the original jury deliberated for some four hours before returning a guilty verdict. The trial judge found the verdict to be inconsistent with his instructions, refused to accept it and sent the jury back for further deliberations. Shortly thereafter, one of the jurors communicated to the court that the sudden death of a co-worker rendered her emotionally unable to continue deliberating. Over the objection of defense counsel the court sent for and

seated a previously discharged alternate juror.[16] The court then reinstructed the jury and told them "to 'begin at the beginning, and begin all your deliberations just as if the case had been submitted to you this instant.'" *Id.* at 1155. Shortly thereafter, the jury returned a guilty verdict. *Id.*

The Court of Appeals reversed the conviction. Based on case law, the history of Rule 24(c) and the views of various commentators, the court concluded that the Rule's unambiguous language was mandatory: "'. . . An alternate juror who does not replace a regular juror *shall be discharged* after the jury retires to consider its verdict,'" 529 F.2d at 1155 (emphasis in original). The Court stated that the Rule was founded in sound reasoning, and held that the trial court's intentional contravention of the Rule over defendant's objection required reversal. *Id.* at 1155-57. "The mandatory provision of Rule 24 having been violated, the period of time during which the substitute juror participated in the deliberations is essentially irrelevant." *Id.* at 1156 n.7.

There are no meaningful factual distinctions between *Lamb* and the instant case. Only the result is different. In each case the alternates were excused.[17] In each case

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[16] At the time she was excused, the alternate was asked by the trial judge "to 'stand by' in case it was 'necessary for [her] to come in.'" *United States v. Lamb*, 529 F.2d at 1154-55.

[17] In *Lamb* the alternate was excused and told, without more, to be available if needed. 529 F.2d at 1154-55. In *Kopituk* which, unlike *Lamb*, was a highly publicized case, the alternates were sequestered separate from the regular jurors for the first five days of the jury's deliberations and were instructed not to discuss the case with the regular jurors, the media and other specified groups. (See discussion *supra* at 4-5.) Importantly, the two alternates were not told not to discuss the case with each other. (App. D at

[footnote continued]

an alternate was recalled to substitute for a juror[18] after significant deliberations had begun.[19] In each case, the defendants objected.[20] And in each case a verdict of guilty was returned.

141a.) When alternate juror Evangelist was interrogated prior to being impanelled, the court failed to inquire about her possible discussion of the case with the other alternate. (App. D at 264a-267a.) Given the fact that the two alternates, who had spent over six months in the same courtroom hearing the same evidence, were obliged to spend five days sequestered together but apart from the deliberating jurors, it strains the limits of credulity to suppose that they would not have exchanged their views about the case with each other, particularly since the judge had not asked them to refrain from doing so. It thus seems likely that in *Kopituk* there were fourteen jurors who deliberated on the defendants' verdict, compared to the thirteen in *Lamb*.

On the fifth day of jury deliberations, the trial court in *Kopituk* excused the alternates, explaining that the problem which might have occasioned their activation had passed (App. D at 165a-167a), requested that they not discuss the case with anyone and that they "avoid the Press and television coverage in the slim possibility that we might still call you." (App. D at 166a.) Seven days later the court recalled the alternate, who claimed that she had not discussed with anyone the highly publicized case which was receiving continuing media coverage during the jury's deliberation and which had monopolized her time for the past six months.

[18] In *Kopituk*, but not *Lamb*, the court questioned the remaining regular jurors as to whether they could erase all prior deliberations from their minds and start anew. See pp. 9-11, *supra*. In both cases the judge reinstructed the reconstituted jury and told them they must begin their deliberations as though there had been no prior deliberations. *Compare* App. A at 32a-34a n.14; 690 F.2d at 1307-08 n.14, with *United States v. Lamb*, 529 F.2d at 1155.

[19] In *Kopituk* some twelve days passed between the time the sequestered jury began deliberations and the time the alternate was seated. (App. A at 40a-41a; 690 F.2d at 1310-11 n.17.) Approximately seven of the twelve days of sequestration involved deliberations. (See App. D at 138a, 146a, 165a, 163a, 172a.) In *Lamb* the alternate was recalled the day after deliberations began. 529 F.2d at 1155.

[20] In *Kopituk* the defense objected to the court's refusal to dismiss the alternates immediately after the jury retired to deliberate

[footnote continued]

In *Lamb* it was undisputed that the remaining regular jurors had already formed opinions and voted to convict. 529 F.2d at 1155. Only the court's refusal to accept their verdict as being contrary to its instructions barred conviction by the regular jury. Clearly, the eleven remaining regular jurors were in substantial agreement by the time the alternate was seated. A guilty verdict was returned twenty-nine minutes after the reconstituted jury began deliberating. *Id.* But the court explicitly concluded that the *amount of time* the substitute juror participates in the deliberations is essentially irrelevant (*id.* at 1156 n.7), and stated that the plain violation of the Rule occurs when the alternate is permitted to participate in deliberations after the original jury retires, not when the alternate participates after the jury has reached some stage in the deliberations. *Id.* at 1156 n.3.

In *Kopituk* the facts regarding the extent to which the eleven remaining regular jurors had made up their minds about the defendants' guilt by the time of the substitution are somewhat less clear than in *Lamb*. Importantly, however, in *Kopituk* the coercive pressures on the alternate may have been equally strong, but the prejudice to petitioners by reason of the court's refusal to grant a mistrial was dramatically greater. Unlike the situation in *Lamb* where all twelve regular jurors were for conviction, there is strong reason to believe that here Juror Loescher was for acquittal. The court-appointed psychiatrist who

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(App. D at 141a-142a); in *Lamb* the defendant did not object to the court's directive that the alternate stand by. 529 F.2d at 1157 (Wright, J., dissenting).

In both *Kopituk* and *Lamb* defense counsel objected to the procedure of substituting the alternate after deliberations had begun and in both cases moved for mistrial. *Compare* App. A at 31a; 690 F.2d at 1307 and App. D at 262a, with 529 F.2d at 1155.

interviewed Mrs. Loescher reported that she constituted a minority of one on "a vote of some kind." (App. D at 244a.) The fact that the jury had in fact balloted on verdicts was established during the court's interrogation of the remaining jurors prior to seating the alternate. (*See* App. A at 31a; 690 F.2d at 1307 n.13; App. D at 271a, 294a.) Thus, if Mrs. Loescher had been strong enough emotionally to withstand the onus of being the lone holdout, a mistrial might have resulted.

No questions were asked of the jurors as to whether they had individually formed opinions as to guilt of the defendants, and, if so, whether their opinions were the product in whole or in part of their discussions with other jurors. (*See* App. D at 278a-327a.) Thus, while the jurors were superficially questioned about their ability to start anew (see pp. 9-11, *supra*), there was no probing of the effect of the deliberative process on them individually. It would be surprising if the jurors could have responded honestly that they were unaffected by the views of their fellow jurors during the prior deliberations, particularly since they had been previously instructed that:

> It is the essence of the jury system that you will listen to the views of one another and that you will do so with open minds and with a disposition to accept the views of the others, if the reasons advanced are persuasive, based on the evidence and not contrary to the court's instructions on the record.

(App. D at 138a.) Indeed, the Court of Appeals conceded the obvious fact that the "further along deliberations proceed, the more difficult it becomes to disregard them and begin anew." *United States v. Kopituk,* App. A at 41a; 690 F.2d at 1311.

It is readily seen that the jurors were subjected to conflicting instructions. First, they were told that the essential feature of their deliberations would be their ability to accept the reasonable views of their fellow jurors. Presumably they followed this directive for the next twelve days. Then, abruptly, they were directed to expunge everything that had occurred during these deliberations, and begin "anew."

It is beyond dispute that the Ninth Circuit would have reversed the conviction in *Kopituk* on the basis of *Lamb*.

A. Other Courts of Appeals Would Reach the *Lamb* Result and Would Disagree with the Eleventh Circuit's Decision in This Case.

A review of the cases dealing with violations of Rule 24(c) reveals that the Second, Fourth and Tenth Circuit Courts of Appeals would decide the case at bar in accordance with the Ninth Circuit's en banc decision in *Lamb*, while the Fifth Circuit and perhaps the Seventh Circuit would agree with the Eleventh Circuit's decision below.

In *United States v. Hayutin*, 398 F.2d 944 (2d Cir.), *cert. denied*, 393 U.S. 1961 (1968), *subsequent appeal sub nom. United States v. Nash*, 414 F.2d 234 (2d Cir.), *cert. denied*, 396 U.S. 940 (1969), the alternates were not discharged when the jury retired to deliberate; however, there was neither communication nor contact between the regular jurors and the alternates after the jury retired to deliberate, and at no time did the alternates participate in the deliberations. 398 F.2d at 950. Because there was no contact between the alternates and the regular jurors, the court did not reverse the convictions. Nevertheless, in response to the government's argument that the alternate could be seated once deliberations had begun, the court noted that this would violate the Double Jeopardy clause:

> The prejudice flows from the fact that a defendant runs the risk of being tried by more than the twelve jurors guaranteed to him by the Constitution and the Rule, or of being placed in double jeopardy by being tried by more than one jury. (*Patton v. United States,* 281 U.S. 276, 50 S. Ct. 253, 74 L. Ed. 854).

The court concluded that since the provisions of Rule 24(c) were both unambiguous and mandatory, and the "absence of benefit being so clear and the danger of prejudice so great, it seems foolhardy to depart from the command of Rule 24." *Id.*[21]

In *United States v. Virginia Erection Corp.*, 335 F.2d 868 (4th Cir. 1964), an alternate was permitted to sit mute in the jury room during deliberations. Although there was no evidence that the alternate disobeyed the instruction to remain mute, the Fourth Circuit reversed the conviction. 335 F.2d at 873. The court stressed the mandatory requirements of Rule 24(c), which allows substitution of an alternate only *prior* to the time the jury retires to consider its verdict and which requires that the alternates be discharged thereafter. *Id.* at 871. As the court stated, it is "most unwise to place the judicial stamp of approval upon this attempt . . . to circumvent the established rule and to substitute unauthorized

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[21] In *United States v. Viserto*, 596 F.2d 531 (2d Cir.), *cert. denied*, 444 U.S. 840 (1979), the court reaffirmed *Hayutin* and cautioned that "Rule 24(c) represents a national consensus of bench and bar and ought not be disturbed on a local level." 596 F.2d at 540. In *Viserto* the court, with the consent of the parties, followed a procedure wherein sixteen jurors were impanelled without any designation as regulars or alternates. Prior to deliberations the defense and prosecution were given the opportunity in turn to "strike" jurors until twelve remained. *Id.* at 539.

procedures." *Id.* at 873.[22] *See also, United States v. Beasley,* 464 F.2d 468 (10th Cir. 1972), where an alternate juror inadvertently retired with the regular twelve jurors and participated in the vote to select a foreman and voted to go to lunch. After the alternate was with the jury for about twenty minutes, the court realized its mistake and discharged the alternate. The appellate court reversed, holding that the participation of the alternate in any proceedings after the jury retires to deliberate is grounds for an automatic mistrial. The court held that once the jury retires to deliberate, the alternate's presence destroys the sanctity of the jury:

> Once these proceedings commenced, "the jury" consisted only of the prescribed number of jurors. *The alternate then became as any other stranger to the proceedings regardless of whether she had been discharged.* Thus the alternate juror was as any other outsider would be when she continued to sit with the jurors as they began their own proceedings. *It is apparent that this alternate, up until the critical time, was just as qualified to sit in deliberation as was any other juror, but this qualification ceased*

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[22] *See also United States v. Chatman,* 584 F.2d 1358 (4th Cir. 1978). In a more recent case, *United States v. Evans,* 635 F.2d 1124 (4th Cir. 1980), *cert. denied,* 452 U.S. 943 (1981), the Fourth Circuit upheld a conviction where an alternate had been substituted after the inception of deliberations on the ground that there had been an effective waiver by defendant of his constitutional jury rights. *Id.* at 1126-27. The court was persuaded that with the defendant's knowing preference for proceeding with the alternate that the "manifest necessity to declare a mistrial had been dissipated." *Id.* at 1128. Despite the defendant's express waiver, Judge Ervin dissented on the ground that the substitution constituted plain error. *Id.* at 1129. Noting that thirteen individuals in all "did ponder the fate of Evans," Judge Ervin reasoned that defendant's constitutional right to a jury of twelve had been violated. *Id.* at 1131.

> *whether or not she was discharged under Rule 24 of the Federal Rules of Criminal Procedure.*

Id. at 469 (emphasis added).

And, in *United States v. Baccari*, 489 F.2d 274, 275 (10th Cir. 1973), *cert. denied*, 417 U.S. 914 (1974), where the parties stipulated to the recall of an alternate after deliberations commenced, the court reiterated that "[r]ecall of the alternate juror without the defendants' consent would have been improper and grounds for a new trial." The court concluded, however, that the criteria for "effective waiver of constitutional jury rights" enumerated in *Patton v. United States*, 281 U.S. 276 (1930), had been satisfied by defendants' knowing waiver. 489 F.2d at 275.

Only the Fifth Circuit clearly would agree with the Eleventh Circuit decision in this case. Indeed, the court below reasoned that it was bound[23] by the recent Fifth Circuit decision in *United States v. Phillips*, 664 F.2d 971 (5th Cir. 1981), *cert. denied*, 102 S. Ct. 2965 & 103 S. Ct. 208 (1982), a protracted RICO prosecution which involved the distribution of controlled substances.

Phillips was similar to the instant case in all material respects except that in *Phillips* at least the alternate was sequestered until seated, and then the jury had deliberated for only two days before substitution of the alternate occurred. 664 F.2d at 990.[24]

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[23] *See United States v. Kopituk*, App. A at 35a; 690 F.2d at 1308 (citing Fifth Circuit Court of Appeals Reorganization Act of 1980, Pub. L. No. 96-452; 94 Stat. 1995 (1980)).

[24] Moreover, the court in *Phillips* seemed to depart from an earlier decision by the Fifth Circuit in *United States v. Allison*, 481 F.2d 468 (5th Cir.), *aff'd after remand*, 487 F.2d 339 (5th Cir. 1973), *cert. denied*, 416 U.S. 982 (1974). In that case, following a procedure *requested by defense attorneys*, an alternate juror joined

[footnote continued]

The Seventh Circuit may also agree with the Eleventh. In *Henderson v. Lane,* 613 F.2d 175 (7th Cir.), *cert. denied,* 446 U.S. 986 (1980), the Seventh Circuit rejected a collateral attack on a state court conviction of a defendant where an alternate had been substituted for an ailing juror after two and one-half hours of deliberations. Noting the "brief separation" of the alternate from his former colleagues, the court minimized the argument that the dismissed and reactivated alternate was analogous to a stranger to the proceedings. 613 F.2d at 178. The court disposed of defendant's constitutional argument on the grounds that non-unanimous verdicts in state prosecutions are constitutionally permissible. *Id.* at 178 (citing *Apodaca v. Oregon,* 406 U.S. 404, 411 (1972) (opinion of White, J.)). Finally, the court observed that while defense counsel did not consent to the substitution, neither did he object, remarking that he saw "no alternatives" to the procedure adopted by the trial judge. 613 F.2d 179. Of course, the Seventh Circuit had no occasion in *Henderson* to address Fed. R. Crim. P. 24(c).

Accordingly, the majority of the Circuits that have faced questions similar to that presented in the instant

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the regular jurors during the first portion of deliberations until the court could determine whether one of the regular jurors was well enough to continue deliberations. The alternate was instructed not to participate with the regular panel. The case was remanded for an evidentiary hearing to determine whether there was a reasonable possibility of prejudice from the alternate's *mere presence* during deliberations. The court said:

> The provision of Rule 24(c) that an alternate juror who does not replace a regular juror "shall be discharged after the jury retires to consider its verdict" *is a mandatory requirement that should be scrupulously followed.* Because any benefit to be derived from deviating from the Rule is unclear and the possibility of prejudice so great, *it is foolhardy to depart from the explicit command of Rule 24.*

481 F.2d at 472 (emphasis added).

petition would seem to agree with the Ninth Circuit's decision in *Lamb* rather than the Eleventh Circuit's decision in *United States v. Kopituk.*

II.

THE RATIONALE FOR ENFORCING THE REQUIREMENTS OF RULE 24(c) IS PERSUASIVE.

A. The Commentators

Prestigious legal commentators have supported the proposition that such ad hoc revision of the mandate of Rules 24(c) as by the trial court below is unwise, unfair and probably unconstitutional. In 1941 the Federal Rules Committee tentatively proposed a rule permitting substitution of an alternate after commencement of deliberations. When the proposal was submitted to this Court for approval, the Court asked, "[h]as the Committee satisfied itself that it is desirable or constitutional that an alternate juror may be substituted after the jury has retired and begun its deliberations?"[25] Lester B.

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[25] Indeed, the New York Court of Appeals struck down just such a proposal on constitutional grounds:

> After the case was submitted to the jury the alternate juror was kept separate and apart from the 12 jurors who were engaged in discussing the evidence and deliberating the verdict. It was only after some five hours of deliberations, when one of the regular jurors was excused, that the alternate juror was permitted to enter the jury room and take part in the discussions. During that five-hour period the alternate "cease[d] to function as a juror."
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> * * *
>
> We believe that the Constitution of this State, as it has been construed, prohibits the substitution of an alternate juror—in effect a 13th juror—after the jury has begun its deliberation. While it may be difficult in an individual case to evaluate the extent to which a defendant may be prejudiced by such a substitution, we believe that, once the

[footnote continued]

Orfield, *Trial Jurors in Federal Criminal Cases*, 29 F.R.D. 43, 46 (1961). Thereafter, the provision for seating an alternate after deliberations had begun was dropped from the proposal.[26] Furthermore, the Advisory Committee on the Criminal Trial rejected such a provision because "it is not desirable to allow a juror who is unfamiliar with the prior deliberations to suddenly join the group and participate in the voting without the benefit of the prior group discussion." 3 *A.B.A. Standards for Criminal Justice* § 15-2.7, at 15.74 (2d ed. 1980).

The Judicial Conference Advisory Committee on the Federal Rules of Criminal Procedure has recently reasoned:

> The central difficulty with substitution, whether viewed only as a practical problem or a question of constitutional dimensions (procedural due process under the Fifth Amendment or jury trial under the Sixth Amendment), is that there does not appear

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deliberative process has begun, it should not be disturbed by the substitution of one or more jurors who had not taken part in the previous deliberation and who had "cease[d] to function as" jurors.

People v. Ryan, 19 N.Y.2d 100, 104, 278 N.Y.S.2d 199, 202-03, 224 N.E.2d 710, 712 ((1966) (citation omitted). *Accord State v. Lehman*, 108 Wis. 2d 291, 321 N.W.2d 212 (1982).

Contra, People v. Collins, 17 Cal. 3d 687, 552 P.2d 742, 131 Cal. Rptr. 782 (1976), *cert. denied*, 429 U.S. 1077 (1977) (California Supreme Court held that substitution, pursuant to provision of California Penal Code, of alternate juror after commencement of jury deliberations was proper under California Constitution); *State v. Miller*, 76 N.J. 392, 407, 388 A.2d 218, 225 (1978) (New Jersey Supreme Court held that substitution of alternate juror after one hour and fifteen minutes of deliberations did not offend guaranty of trial by jury under the New Jersey Constitution, although court observed "[t]he longer the period of time the jury deliberates, the greater is the possibility of prejudice should a juror be substituted or replaced").

[26] See Lester B. Orfield, *Criminal Procedure Under the Federal Rules*, § 24.1, at 86-99 (1966).

> to be any way to nullify the impact of what has occurred without the participation of the new juror. Even were it required that the jury "review" with the new juror their prior deliberations or that the jury upon substitution start deliberations anew, it still seems likely that the continuing jurors would be influenced by the earlier deliberations and that the new juror would be somewhat intimidated by the others by virtue of being a newcomer to the deliberations.

Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, "Proposed Amendments to the Federal Rules of Criminal Procedure: Preliminary Draft," 30 *Cr. L. Rptr.* 3001, 3013 (1981). Thus, the Committee rejected a revision of Rule 24 to allow substitution of an alternate after deliberations have begun. *Excerpt from the Report of the Judicial Conference Committee on Rules of Practice and Procedure*; Agenda G-7, at 3 (September 1982) ("[P]roposed Rules 24(c) and (d) were abandoned.") In rejecting the revision, the Committee noted that its judgment was in accord with that of most commentators and many courts. *See also* 30 *Cr. L. Rptr.* 3001, 3012-13 (1981).

For example, as noted by Professor Wright:

> There have been proposals that the rule should be amended to permit an alternate to be substituted if a regular juror becomes unable to perform his duties after the case has been submitted to the jury. An early draft of the original Criminal Rules had contained such a provision, but it was withdrawn when the Supreme Court itself indicated to the Advisory Committee on Criminal Rules doubts as to the desirability and constitutionality of such a procedure. These doubts are as forceful now as they were when they were first voiced. To permit substitution of an alternate after deliberations have begun would

> require either that that alternate participate though he has missed part of the jury discussion, or that he sit in with the jury in every case on the chance he might be needed. Either course is subject to practical difficulty and to strong constitutional objection.

2 Wright, *Federal Practice and Procedure (Criminal)* § 388, at 392-93 (2d ed. 1982) (footnotes omitted).

Further, it has been observed that

> Were the Rule not couched in mandatory language it would invite certain impermissible effects. The inherent coercive effect upon an alternate who joins a jury leaning heavily toward a guilty verdict may result in the alternate reaching a premature guilty verdict.

8A *Moore's Federal Practice* ¶ 24.05, at 24-59 (2d ed. 1982) (footnote omitted). *See also* Hon. Damon J. Keith, "Trial and Post Trial Problems," 75 F.R.D. 359, 360 (1976).

B. The Practical Effects of Departure from the Mandate of Rule 24(c) Outweigh the Benefits.

Empirical research suggests that an alternate juror substituted during the course of jury deliberations may not be able to function as an effective and independent member of the jury. For example, the landmark studies of psychologist Solomon Asch demonstrate that newcomers to a group will frequently alter their judgments in accordance with what they perceive to be the group consensus, even if the group's perception of data is wrong and the newcomer has previously supplied a

correct perception of the same data.[27] Recent studies have further demonstrated that individuals will gear their behavior to their expectations of forthcoming group behavior, even if the group consensus has not yet been expressed.[28]

Sociologists also concur that it is difficult for newcomers to a group, particularly those with external status disadvantages such as would accompany an alternate juror, to attract the group's attention to their views.[29] Moreover, sociologists have concluded that once a group organization has been adopted, as it would have been in the course of the original jury's 12 days of sequestration, the addition of a new member to the group would be unlikely to alter the state of the group's organization.[30]

As the court below was obliged to acknowledge, "the further along deliberations proceed, the more difficult it becomes to disregard them and begin anew." *United States v. Kopituk*, App. A at 41a; 690 F.2d at 1311.[31] It must be recognized that few jury deliberations proceed much "further along" than twelve days. At some point

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[27] S. E. Asch, "Effects of Group Pressure Upon the Modification and Distortion of Judgments," *reprinted in Groups, Leadership and Men: Research in Human Relations* (Guetzkow, H. S. ed. 1957). See also discussion of Professor Asch's studies in Lempert, "Uncovering Nondiscernible Differences: Empirical Research and the Jury-Size Cases," 73 *Mich. L. Rev.* 644, 673-79 (1975).

[28] Sheehan, J., "Conformity Prior to the Emergence of a Group Norm," 103 *J. of Psych.* 121 (1979).

[29] C. Ridgeway, "Conformity, Group-Oriented Motivation, and Status Attainment in Small Groups," 41 *Soc. Psych.* 175, 181 (1978).

[30] T. M. Mills, *Group St. .cture & the Newcomer: An Experimental Study of Group Expansion* at 26 (1966).

[31] *See also, State v. Miller*, 76 N.J. 392, 388 A.2d 218 (1978), discussed *supra* at note 25.

the "difficulty" of the jury's function must cross the threshold to a practical impossibility. To expect of a jury that which our common sense and experience dictates is beyond the capacity of the ordinary person is wrong. To countenance the assumption that the eleven regular jurors here were able to perform the superhuman feat upon which the decision below is premised is to countenance a fiction.

C. Failure to Halt the Ad Hoc Modification of Rule 24(c) Will Result in Uncertainty, Confusion and Unfairness.

In their wisdom, those responsible for promulgating Rule 23 of the Federal Rules of Criminal Procedure determined that in cases where one or more members of a deliberating jury become incapacitated the deliberations may proceed only by express written stipulation of the parties to a jury of less than twelve, and then only with the approval of the court. *See* Fed. R. Crim. P. 23(b). The language of Rule 24(c) was evidently designed to foreclose the possibility that an alternate juror would have any legal function once the jury retires to consider its verdict.

Departure from the rules must necessarily create confusion and uncertainty.[32] The *ex post facto* legitimization by the court below of the trial court's ad hoc revision of Rule 24(c) does violence to the concept of uniformity of treatment which the rules are promulgated to ensure. The Court of Appeals stated:

> It is not our intention, nor is it within our province, to authorize routine deviation from the terms of Rule 24(c). That rule is "the rule" and

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[32] *See United States v. Hayutin, supra,* 398 F.2d at 950; *United States v. Viserto, supra,* 596 F.2d at 540; *United States v. Evans, supra,* 635 F.2d at 1131-1132.

> the substituted juror procedure upheld herein is a narrowly limited exception to the rule, applicable only in *extraordinary* situations and, even then, only when *extraordinary* precautions are taken, as was done below, to ensure that the defendants are not prejudiced.

United States v. Kopituk, App. A at 42a-43a; 690 F.2d at 1311 (emphasis added).

The exception carved out of the Rule by the Eleventh Circuit panel can lead only to confusion and to the undermining of petitioners' constitutional rights to a fair trial by a jury of twelve.

This judicial amendment to Rule 24(c) renders it impermissibly vague.[33] What is an "extraordinary circumstance"? When does a case become "extraordinary"? What are "extraordinary precautions"? How can the court truly ascertain whether the defendants have been prejudiced? When dealing with rights so fundamental as those relating to trial by jury such tinkering cannot be condoned.

Although trials as protracted as the one here are unusual, it must be expected that trial courts will attempt to justify the use of the device here employed in the name of judicial economy in situations involving much shorter trials. While it would be impossible to compile statistics demonstrating the frequency with which the *Phillips/Kopituk* rule revision has been used by trial courts in the Fifth and Eleventh Circuits, one recent example of use by the former Chief Judge of the United States District Court for the Southern District of Florida,

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[33] *Cf. Winters v. New York*, 333 U.S. 507, 509-510, 515 (1948); *Cline v. Frink Dairy Co.*, 274 U.S. 445 (1927); *Cole v. Arkansas*, 338 U.S. 345, 354 (1949).

the trial of an "ordinary" fraud case lasting some twelve days, is provided for purposes of illustration.[34]

In that case, the court advised the two alternates after the jury retired that they were not "through," that if it became

> necessary to excuse any of the deliberating jurors, you will be called to replace that deliberating juror or jurors and the deliberations would start all over again anew and you will be a participant at that instance in the deliberations. And, ultimately and hopefully, you will participate in the verdict that is reached.
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> For that reason, I must preserve you. . . . It is a new procedure that is now available under a Fifth Circuit decision. And we think it is a very good one because it means almost two weeks are not wasted if something should happen, God forbid, to one of the jurors.

(App. E at 344a.)

However trial judges may feel the pressure of heavy dockets, the right of defendants to the equal application of the rules must not be compromised.

CONCLUSION

For the reasons stated herein the petition for certiorari should be granted.

Respectfully submitted,

RICHARD BEN-VENISTE, ESQUIRE

IRVING ANOLIK, ESQUIRE

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[34] *United States v. Entman*, No. 82-326-Cr-CA (S.D. Fla., Jan. 19, 1983) (App. E).